No. 93-955

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, indivdually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

v.

JAMES H. TURNER, Trustee, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

*M. Caldwell Butler
Frank K. Friedman
Nicholas C. Conte
WOODS, ROGERS & HAZELGROVE
10 S. Jefferson St.
P.O. Box 14125
Roanoke, VA 23038-4125
(703) 983-7600

Robert T. Copeland
COPELAND & MOLINARY & BIEGER
P.O. Box 1296
Abingdon, VA 23210
(703) 628-9525

Counsel for Petitioners
*Counsel of Record

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

In tacit recognition that the questions presented in the certiorari petition are substantial, the brief in opposition endeavors for 30 pages -- the maximum permitted by this Court's rules -- to show that the decision below is of little moment.

On analysis of those many pages,

however, what the opposition brief does is confirm that the matters raised in the petition are significant questions which merit this Court's attention. Respondents' repeated claim (Opp. Br. at 5, 30)[1] that this case affects only a narrow segment of SIPA litigants rings particularly hollow. This petition addresses questions at the very heart of the bankruptcy system, and the decision appealed from calls into question the continued vitality of recent opinions of this Court. If alleged fraudulent conveyances and preferences involve "private rights" as this Court stated in Granfinanciera v. Nordberg, 492 U.S. 33 (1989), then how can Congress' "taxonomic" denomination of such matters as "core proceedings" automatically divest petitioners

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[1]References to the Brief of Respondents in Opposition to the Petition for Writ of Certiorari shall be to "Opp. Br."

of their entitlement to an Article III adjudication?

Notably, the central reason offered by respondents for denying petitioners an Article III adjudication is that petitioners allegedly submitted themselves to the equitable jurisdiction of the bankruptcy court by filing a SIPA proof of claim and a counterclaim in the bankruptcy court. Respondents allege that this constituted a waiver of any right to an Article III adjudication. What respondents neglect to tell this Court is that when these filings were made it was before 1984, at a time when there was believed to be jurisdiction in the bankruptcy court under the Bankruptcy Reform Act of 1978. That court was, of course, abolished by BAFJA in July, 1984. Upon enactment of BAFJA, petitioners promptly notified the bankruptcy judge that he lacked

jurisdiction to hear and determine the matter -- and he agreed.

With respect to the interplay of 15 U.S.C. § 78eee(b)(4) and 28 U.S.C. §§ 157 and 1334, respondents provide a lengthy explanation as to why a literal interpretation of Congress' actual language in those statutes must be disregarded. Respondents argue that, based upon their perception of Congressional intent (under the unconstitutional jurisdictional provisions of the 1978 Bankruptcy Reform Act), Congress meant precisely the opposite of what it said. Again, respondents' discussion illustrates that determinations of the proper scope of bankruptcy jurisdiction are thorny issues which cry out for further clarification from this Court.

ARGUMENT

I. THE PREFERENTIAL AND FRAUDULENT TRANSFER PROCEEDINGS IN THIS CASE ARE MATTERS OF PRIVATE RIGHT THEREBY ENTITLED TO ADJUDICATION BY AN ARTICLE III COURT AND PETITIONERS DID NOT WAIVE THIS ENTITLEMENT.

A. The respondents' interpretation of this Court's decision in Granfinanciera highlights the existing confusion.

Respondents incorrectly and summarily dismiss Granfinanciera as being inapplicable and uninstructive. Respondents argue that this Court's decision in Granfinanciera is limited to "one of entitlement to a jury trial [which] is not before this Court." (Opp. Br. at 25). Ironically, respondents' position illustrates the continued confusion regarding the scope and impact of this Court's decision in Granfinanciera.

While Granfinanciera involved the right to a jury trial, this Court expended great effort in analyzing the history of the right

to trial by jury, and its constitutional and procedural impact. In delineating the important substantive differences between matters of private right and public right, this Court reaffirmed that an action which involves a private right can only be adjudicated by an Article III Court. Granfinanciera, 492 U.S. at 53. (Pet. at 36-40.)

The underlying action in Granfinanciera, namely, the recovery of alleged preferences and fraudulent conveyances, is identical to the underlying action in this case. Granfinanciera stands for the proposition that such proceedings are matters of private right, subject to adjudication by an Article III court. Granfinanciera, 492 U.S. at 53. Respondents apparently take the position that, although this Court has held such actions to be matters of private right, this

Court did not intend them to be treated as private rights unless a jury trial was requested.

After dismissing Granfinanciera out of hand, respondents cite six cases at page 26 of their brief for the proposition that the "decision of the Tenth Circuit is fully consistent with the pertinent case law." Four of these six cases were decided before this Court's decision in Granfinanciera, and therefore do not address the issues present in this case.[2]

The two post-Granfinanciera cases cited by respondents illustrate the continuing

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[2]Notably, in the case of In re Mankin, decided pre-Granfinanciera, the Ninth Circuit, relying on the designation by Congress of fraudulent conveyance actions as core proceedings, stated that the designation "as a core proceeding would not justify the Bankruptcy Court's jurisdiction if we were to find that . . ." the underlying core proceeding did not involve a public right. 823 F.2d at 1307. (Pet. at 43.)

confusion since that decision. The most recent of these two cases is Stein v. Miller 158 B.R. 876 (S.D. Fla. 1993). That case involved actions brought by the bankruptcy trustee to avoid allegedly preferential and fraudulent transfers in the bankruptcy court The transferrees, citing to Granfinanciera, requested a jury trial of these issues.

The transferrees also specifically requested that motions be heard and decided by an Article III judge. The district court specifically noted that this Court's decision in Granfinanciera ". . . appears to dictate an article III forum for the adjudication of 'private right' claims." 158 B.R. at 879. The district court refused to follow that dictate, reasoning that the fact that this Court left open the question of bankruptcy court conducted jury trials evidenced a contrary reading of this Court's opinion.

The district court acknowledged that "the Eleventh Circuit has noted the difficulty of this issue . . . ." 158 B.R. at 878, citing to In re Davis, 899 F.2d 1136 (11th Cir. 1990) cert. denied, 498 U.S. 981 (1991).[3]

Despite the clear language of Granfinanciera regarding the distinction between the treatment of matters of private and public right, confusion and uncertainty reign among the courts at this time.

B. This Court's decision in Katchen v. Landy does not divest petitioners of their right to have an Article III judge adjudicate the matters at issue.

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[3]Notably in Stein the summary judgement motion at issue could be heard de novo by the district court, as it involved only questions of law and did not involve findings of fact. Stein, 158 B.R. at 879-880. Similarly, the other post-Granfinanciera opinion relied upon by respondents, In re Roppolo, 111 B.R. 113 (Bkrtcy. W.D. La. 1990), speaks volumes as to the difficulty courts have faced in grappling with the issues raised by this Petition.

Citing this Court's decision in Katchen v. Landy, 382 U.S. 323 (1966), respondents state that petitioners invoked the jurisdiction of the Bankruptcy Court. Respondents understandably chose to ignore the discussion of Katchen contained in Pet. at 54-57. As discussed in greater detail therein, the effect of this Court's decision in Katchen is to convert legal claims into equitable claims as a part of the process of allowing claims, if the creditor has filed a proof of claim. It is petitioners' position that a SIPA proof of claim, filed with a SIPA Trustee in a SIPA liquidation proceeding, is not sufficient to constitute a claim filed with the bankruptcy court. (Pet. at 48-51.)

Furthermore, Katchen did not address the issue of a litigant's entitlement to have a private right adjudicated by an Article III judge. Perhaps most significantly, Katchen

was decided in 1966 when the district court essentially was permitted to review the findings of the bankruptcy referee de novo, and the litigant had the opportunity to request an Article III adjudication of findings of fact. Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79, n.31 (1982).

The filing of a claim does not convert a private right into a public right, thereby vesting jurisdiction in a non-Article III court. Thus, Katchen does not support respondents' position.

C. Petitioners did not consent to jurisdiction in a non-Article III court, and petitioners neither did nor could waive their right to raise these jurisdictional matters.

Respondents state, without authority, that "by filing a claim in the SIPA proceeding. . . Mr. Davis invoked the jurisdiction of the Bankruptcy Court. The

fact that the claim was filed in the SIPA proceeding with the Trustee warrants no different conclusion." Opp. Br. at 29, citing 11 U.S.C. § 101(5) and SIPA §78fff(b).

In fact, there are significant differences between the Title 11 claims process and that of SIPA. (Pet. at 48-51.) Section 78fff(b) of SIPA, which provides that a liquidation proceeding under SIPA shall be conducted in accordance with Chapters 1, 3 and 5 and subchapters I and II of Chapter 7 of Title 11, does not go so far as to make those provisions of Title 11 specifically applicable in a SIPA liquidation case.

Significantly, Section 329, by its terms, is made applicable only to the attorney for a debtor in a case commenced under Title 11. 11 U.S.C. §101(13). Therefore, Section 329 does not become applicable unless a debtor's attorney is

ordered to comply with that Section by court order. Inasmuch as an attorney for a debtor in a SIPA liquidation case is not required, automatically, to comply with Section 329, it is inherently inequitable to find that the entering of a court order mandating such compliance is sufficient to waive petitioners' right to an Article III adjudication.

Likewise, the counterclaim filed by petitioners does not constitute a waiver. Respondents erroneously assert that this "counterclaim constitutes a 'claim'", and that petitioners thus "subjected [themselves] to the jurisdiction of the bankruptcy court." What respondents neglect to note is that the counterclaim in question was filed in March, 1982, three months prior to this Court's decision in Marathon. At the time the counterclaim was filed, the ill-fated

bankruptcy court had exclusive jurisdiction under the 1978 Bankruptcy Act. BAFJA was still two years away. Consequently, at the time the counterclaim was filed, petitioners had no choice but to file the counterclaim i the court which Congress assumed was a court of the United States, and which was, at that time, the only court which had jurisdiction.

Following the effective date of BAFJA, petitioners promptly notified the bankruptcy judge that he lacked jurisdiction to hear th matter. Petitioners have zealously preserve their right to an Article III adjudication a every stage of these proceedings and respondents lamentations are completely without merit.

Respondents, similarly, cry "waiver"

with regard to several jurisdictional arguments raised in the Petition. (Opp. Br. at 27-30.) These protests are unfounded, and, in any event, an objection to a court's lack of jurisdiction over the subject matter may be raised for the first time in a court of appellate review. Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U.S. 635 (1945); see also, California v. La Rue, 449 U.S. 109 (1972).

Rule 12(h)(3) of the Federal Rules of Civil Procedure codifies the established rule that jurisdiction over subject matter cannot be created or waived by the parties, and may be considered upon motion by any interested party at any time. C. Wright and A. Miller, Federal Practice and Procedure 1393, p. 864-866. Rule 12(h)(3) is incorporated into the Bankruptcy Rules by Bankruptcy Rule 7012(b).

II. CONGRESS HAS NOT PROVIDED ANY STATUTORY BASIS FOR CONFERRING JURISDICTION OF TITLE 15 LITIGATION UPON BANKRUPTCY JUDGES.

Respondents concede that a literal interpretation of relevant statutes does not give bankruptcy judges jurisdiction of Title 15 matters. Simply put, under 28 U.S.C. § 1334 district courts have "original and exclusive jurisdiction of all cases under Title 11"; under 15 U.S.C. § 78eee(b)(4) SIPA matters are to be heard in the court of the United States "having jurisdiction over cases under Title 11"; and under 28 U.S.C. § 157 a district court may refer to a bankruptcy judge only "cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11." Confronted by the fact that Title 15 proceedings do not fall into any of these categories, (and that all federal courts are

courts of limited jurisdiction), respondents resort to various efforts to rewrite the plain meaning of the above statutes.

Respondents suggest that § 78eee(b)(4) has been rendered "facially meaningless" (Opp. Br. at 3, 10) thereby justifying a detailed survey of Congressional intent. Respondents ignore that the statute plainly gives jurisdiction of SIPA matters to district courts (as the courts having jurisdiction over Title 11 cases). Then, when respondents resort to legislative history, they focus on the unconstitutional jurisdictional provisions of the 1978 Bankruptcy Reform Act as the source of the intent on which they rely.[4] Under respondents' interpretation, the court in

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[4]For discussion of the repeal of the Bankruptcy Reform Act of 1978 and abolishment of Bankruptcy Courts established thereunder see Pet. at 12-19.

which Congress supposedly intended SIPA matters to be heard is the 1978 "bankruptcy court." But that court was abolished in 1984 and its jurisdiction was transferred to the district court under BAJFA. Again, the 1984 amendments to 28 U.S.C. § 1334 limited referral of Title 15 matters to district courts. Respondents repeatedly misplace reliance on abolished courts and repealed legislation for the backbone of their "legislative history" argument.

Moreover, respondents cavalierly assume that Congress, in failing to grant jurisdiction of Title 15 matters to bankruptcy judges, simply did not foresee the SIPA consequences of BAFJA. Respondents fail to address this Court's relevant precedent "that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give

effect to its plain meaning." Union Bank v. Wolas, 502 U.S. _____, 112 S.Ct. 527, 531 (1992); Toibb v. Radloff, 501 U.S. _____, 111 S.Ct. 2197 (1991).

Next, in an effort to fit SIPA within the jurisdictional parameters of 28 U.S.C. § 1334, respondents offer analysis as to how SIPA can be viewed as a proceeding under both Title 15 and Title 11 or, in the alternative, why SIPA matters are not Title 15 matters at all (because they have not been enacted into "positive law") and should, instead, be viewed as cases arising under Title 11. Not surprisingly, respondents offer no case law suggesting that SIPA is anything but a Title 15 entity. More importantly, respondents' creative and varied explanations as to how SIPA should be interpreted in the confusing post-BAFJA era only highlight the need for clarification from this Court as to the

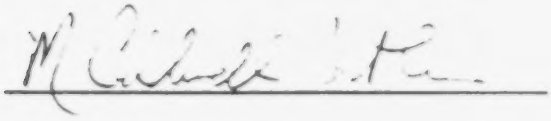
parameters of the jurisdiction afforded bankruptcy judges under BAFJA.[5]

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GILBERT K. DAVIS AND
DAVIS, GILLENWATER & LYNCH



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[5]One of the creative explanations offered by respondents is found in their footnote 13, where they suggest that "public rights are at stake because this proceeding arises within a SIPA case", and "[b]ecause SIPA is rooted in the commerce clause." Opp. Br. at 24, n.13. Ironically, if respondents' strained assertions are correct, the district court is mandated to withdraw the reference under 28 U.S.C. 157(d), which states in relevant part that "the district court shall, on timely motion of a party, so withdraw a proceeding if it determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating . . . activities affecting interstate commerce." (emphasis added.)

M. Caldwell Butler
(Counsel of Record)
Frank K. Friedman
Nicholas C. Conte
Woods, Rogers & Hazlegrove
10 S. Jefferson Street
Post Office Box 14125
Roanoke, Virginia 24038-4125
(703) 983-7600

and

Robert T. Copeland
Copeland, Molinary & Bieger, P.C.
Post Office Box 1296
Abingdon, Virginia 24210
(703) 628-9525

CERTIFICATE OF MAILING

I, M. Caldwell Butler, do hereby certify that I mailed prepaid, a true and correct copy of the foregoing on this the 26th day of January, 1994, to the following: Mr. Theodore H. Focht, Ms. Josephine Wang, Mr. Michael E. Don, counsel for Securities Investor Protection Corporation, Office of General Counsel, 805 15th Street, N.W., Suite 800, Washington D.C. 20005-2207; and Ms. Adrienne H. Benavidez, Ms. Maria J. Flora Gorsuch, Kirgis, Campbell, Walker & Grover, counsel for James H. Turner, Trustee, 1401 17th Street, Suite 1100, P.O. Box 17180, Denver, CO 80217-0180.

M. Caldwell Butler